IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01906/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12 October 2015	**On 27 October 2015**

Before

THE HONOURABLE MR JUSTICE HOLROYDE
UPPER TRIBUNAL JUDGE GILL

Between

MR SHAHJAHAN AFZAL
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Ahmed, Counsel instructed by 12 Bridge Solicitors
For the Respondent: Ms A Everett, Home Office Presenting Officer

DECISION AND REASONS

1. On 8 October 2014 the Secretary of State for the Home Department decided to deport Mr Shahjahan Afzal following his earlier conviction and sentence for serious criminal offences. Mr Afzal appealed against that decision. On 13 April 2015 First-tier Tribunal Judge Woodcraft dismissed the appeal.

2. Mr Afzal now appeals to the Upper Tribunal pursuant to limited permission granted on 14 July 2015. This is the decision of the Upper Tribunal upon hearing the appeal.

3. Summarising the relevant history very briefly, Mr Afzal entered the United Kingdom on 14 September 2005. He entered lawfully but then overstayed. His visa expired on 6 January 2006. In the period since then, nearly a decade, he has had no entitlement to remain in the United Kingdom. On 30 August 2013 in the Crown Court at Harrow Mr Afzal pleaded guilty to serious offences involving deception of the immigration authorities. He was sentenced, having been given credit for his guilty pleas, to a total of thirteen and a half months' imprisonment. The learned judge who sentenced him summarised the position by saying: "*The plain fact is that you were able to live in this country with your family by a series of deceptions on the immigration authorities".* The deceptions related to false documentation about purported academic study, false documents relating to a sham marriage and false documents relating to children.

4. Mr Afzal's wife was convicted after trial of similar offences. She too received a total sentence of thirteen and a half months' imprisonment. She had pleaded not guilty and therefore could receive no credit for a guilty plea. On the other hand she had particular personal mitigation relating to the fact that she had suffered violence from Mr Afzal in the course of the marriage.

5. As a result of his convictions and sentence Mr Afzal became a foreign criminal within the meaning of the legislation and liable for automatic deportation. By Section 32 of the United Kingdom Borders Act 2007 the Secretary of State was required to make a deportation order unless one of the exceptions in Section 33 applied. In this case Mr Afzal particularly relied upon the exception in Section 33(2) that his removal from the country would breach "a person's Convention rights".

6. By Section 117A of the Nationality, Immigration and Asylum Act 2002 the Secretary of State was obliged to have regard to the considerations in Sections 117B and 117C. It is not necessary to set out those provisions in this judgment.

7. On 8 October 2014 the Secretary of State notified Mr Afzal of her decision to deport him. Her reasons were set out in detail in a lengthy letter. Mr Afzal appealed against that decision and his solicitors prepared a substantial bundle of documents. The appeal was listed for hearing on 4 December 2014.

8. About two weeks before that date Mr Afzal's solicitors wrote to the Tribunal saying that they had issued proceedings in the family court seeking a child arrangement order and a residence order in respect of Mr Afzal's three children then aged 16, 13 and 12. The solicitors indicated that there was likely to be a hearing in about mid-January 2015 and

submitted that the appeal against the Secretary of State's order should await that hearing. The listing of the appeal was then adjourned. A case management hearing was held in the First-tier Tribunal on 8 December 2014. By that stage no response had yet been received from the family court.

9. The final hearing of the appeal was on that occasion listed for 4 February 2015. On that date Mr Afzal and a number of prospective witnesses attended. The appeal did not, however, proceed, for two reasons. First, it was said that Mr Afzal had not yet received the Secretary of State's bundle of documents. Secondly, the judge was informed that a further hearing in the family court had been fixed for 16 March 2015. We have had the advantage that the submissions before us today on behalf of Mr Afzal have been made by Counsel Mr Ahmed, who was present at the hearing on 4 February 2015. He has told us - and we of course accept from him - that at that hearing he was able to put before the judge, First-tier Tribunal Judge Woodcraft, his draft copy of what had in fact by then become an order of the family court made on 29 January 2015. That order was an interim order subject to further consideration once Cafcass had completed certain necessary enquiries. It recorded, however, that the family court in principle approved child arrangements which included the three children residing with their father every weekend during the school term and for half of each school holiday. In addition there was provision for the children to stay with their father overnight on a Wednesday once every four weeks and provision for telephone communication at other specified times.

10. The outcome of the hearing of 4 February 2015 was that the matter was adjourned to be relisted before the same judge on 13 March 2015. Mr Ahmed tells us, and again of course we accept from him, that it was by then known that the family court would be considering final approval of the interim arrangements order on 16 March. Unsurprisingly therefore the question arose of whether the hearing of this appeal should be adjourned for a somewhat longer period so that it would take place after the family court had made its final adjudication.

11. Mr Ahmed tells us that on that occasion the judge did not find it necessary to adjourn to a date later than he did, because he had seen the terms of the draft of the January interim order and had indicated that that would provide a basis for him to consider the extent and quality of Mr Afzal's relationship with his children.

12. So it was that the hearing of the appeal was adjourned until 13 March 2015. The day before that hearing, on 12 March, Mr Afzal's solicitors again wrote to the Tribunal requesting an adjournment. They did so on the basis that Mr Afzal had the misfortune to be unwell with gout and would be unable to attend. No request was made for an adjournment on a ground relating to the date of the hearing in the family court. Mr Ahmed indicates that was because of the indication which had been given by the judge at the February hearing.

13. Judge Woodcraft rejected the application for an adjournment on medical grounds. He was in our judgment plainly right to do so. The evidence put before him comprised a letter from Mr Afzal's general practitioner which did not say that Mr Afzal was unfit to attend.

14. So the application for an adjournment was refused and the matter came on for the hearing of the appeal on the following day, 13 March. Mr Afzal was not present. More than that, his witnesses were not present either because they had been stood down. Counsel other than Mr Ahmed attended but indicated that his primary instructions were limited to applying for an adjournment and that he would be handicapped in dealing fully with other issues. Counsel did apply for the adjournment. The judge refused it. The hearing then proceeded by way of submissions and the documents before the Tribunal. Those documents included a statement from Mr Afzal in which he referred to the order of the family court in January but surprisingly neither quoted its terms accurately nor produced a copy of that order itself.

15. In the course of his judgment the judge summarised the submissions on either side. He referred to the evidence in the statement provided by Mr Afzal. He indicated, rightly, that the best interests of the children were a primary though not paramount concern for the Tribunal. He concluded that as the children had refugee status as a result of the successful claim by their mother that she had been the victim of domestic violence at the hands of their father, it would therefore not be reasonable and indeed would be unduly harsh to expect the children to travel with Mr Afzal to Pakistan. The judge continued:

> "The question however is whether it would be unduly harsh for the children to remain behind in the United Kingdom whilst the appellant is deported to Pakistan. That requires an examination of the relationship between the appellant and the children."

16. The judge then proceeded in particular in paragraphs 37 and 38 of his judgment to conduct an examination of that relationship. Unfortunately it would appear that in doing so he overlooked the evidence which was already before him as to the proceedings in, and interim order made by, the family court. It is perhaps understandable how the judge came to fall into that error. As we have indicated, Mr Afzal's own statement did not quote the terms of the order with any precision; the order itself does not appear at any stage to have been put before the court; the court file does not contain any copy of the draft document which Mr Ahmed says he had shown to the judge at the February hearing; and the request made only the previous day for an adjournment of the hearing of the appeal had not made any reference to the imminent hearing in the family court. In all those circumstances we can, as we say, see how it may have come about that the judge overlooked what he had previously been told.

17. Be that as it may, the judge in his judgment described Mr Afzal as having "*a limited form of contact with his children*". He noted from a letter of support written by Mr Afzal's wife that contact with the children had not

apparently been denied. The judge continued: "*There is no evidence that the appellant has in fact issued proceedings in the Family Court for an order.*" He noted as significant the fact that the very recent application for an adjournment had not mentioned the pending hearing before the family court. He continued:

> "In those circumstances I reject the argument that the appellant would need to remain in this country to pursue family court proceedings as it does not appear that they are in existence, if they are their institution would appear to be quite unnecessary and merely a device to delay the appellant's deportation."

18. The judge went on in his judgment to refer to the appellant Mr Afzal himself being responsible for the recent restriction on his contact with the children due to his imprisonment. He continued:

> "It is evidently not in the best interests of the children that they should reside with the appellant and no-one suggests that they should. There is evidence to suggest that the appellant has increased his interest in the contact arrangements with an awareness that the deportation proceedings are pending. However the key issue is what is in the best interests of the children and the best interests are that they should continue to be looked after by their mother the appellant's estranged wife. To the extent that their best interests would include maintaining a relationship with their father, this would in my view be outweighed by the public interest in the appellant's deportation in the light of his conviction for serious immigration offences."

19. An initial ground of appeal against the judgment based on wrongful refusal of the adjournment was rejected by the judge who granted permission and that has not been further pursued. Permission was granted on the limited basis that there was an arguable issue in respect of the family proceedings, which was of arguable relevance in respect of the best interests of the children and the implications for them of Mr Afzal's removal from the United Kingdom.

20. Pursuing that ground of appeal Mr Ahmed submits that in the circumstances which we have summarised the judge simply overlooked an important aspect of the potentially relevant evidence and that accordingly his assessment of the true nature of the relationship between Mr Afzal and his children was inevitably flawed.

21. Ms Everett on behalf of the Secretary of State accepts that it appears that the judge may have overlooked at least part of the evidence which was already before him. She submits, however, that when his judgment as a whole is considered this Tribunal should conclude that his decision would have been the same even if the full terms of the court order had been before him.

22. She further submits that the factors which the judge appears to have regarded as somewhat suspicious, for example as to the genuineness or otherwise of Mr Afzal's recent desire for increased contact with his children, are matters which would have carried equal force even if the

family court order had been available in its precise terms. In short, she submits, whatever error may have been made by the judge made no difference to the outcome of the hearing because a full knowledge of the family court proceedings would not have put Mr Afzal in any stronger position than the judge found him to be.

23. We have considered those competing submissions. We remind ourselves of that part of the judgment below which we have already quoted: "*that requires an examination of the relationship between the appellant and the children*". It is very regrettable that a situation arose in which the judge appears to have overlooked, and appears not to have been reminded of, the full detail as it was then known of the family proceedings; but whatever the explanation for that unhappy situation may be, the end result is that the judge did not hear or consider a full account of the arrangements for Mr Afzal to have the children not merely in contact with him but also residing with him for significant proportions of their lives. Nor did the judge proceed on the basis that the arrangements for residence and contact were exactly as they in fact were pursuant to the family court order.

24. It seems to us that in those circumstances there has been a material error, for the judge has made his decision without taking into account the full detail of evidence which he may have found relevant to his final determination.

25. In those circumstances it seems to us that his decision cannot stand. It must be set aside on the grounds of a material error as to evidence which may have been of significance.

26. We have considered how best to resolve matters once the decision below is set aside. In the majority of cases the Upper Tribunal when setting aside the decision will be able to remake the relevant decision itself. However, the Practice Statement for the Immigration and Asylum Chamber of the Upper Tribunal at paragraph 7.2 recognises that it may not be possible for the Upper Tribunal to proceed to re-make the decision when it is satisfied that:

> "(a) The effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal."

27. In our judgment this case falls within that category. The points made by Ms Everett are of course points which will need to be considered at the rehearing before a different Judge of the First-tier Tribunal but we are satisfied that there must be a rehearing.

Notice of Decision

For those reasons the decision of the First-tier Tribunal involved the making of an error on a point of law such that it falls to be set aside. We set it aside in its

entirety. We remit this case to the First-tier Tribunal for a hearing of Mr Afzal's appeal against the deportation decision on the merits on all issues by a judge other than Designated Judge of the First-tier Tribunal Woodcraft.

Anonymity

The First-tier Tribunal did not make an anonymity order. No application was made to the Upper Tribunal for an anonymity order.

Signed Date

Mr Justice Holroyde